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Supreme Court, U.S.
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No. 88-255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WARREN GARRETT,
Petitioner,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LASHLY, BAER & HAMEL
A Professional Corporation
JAMES E. MCDANIEL*
ROBERT A. KAISER
714 Locust Street
St. Louis, Missouri 63101
(314) 621-2939

DAVID M. DAVIS, Legal Staff
GENERAL MOTORS CORPORATION
3031 West Grand Boulevard
Detroit, Michigan 48232

Attorneys for Respondent

*Counsel of Record

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

QUESTION PRESENTED

1. Did the Court of Appeals for the Eighth Circuit correctly hold that a Title VII suit can be barred by the application of laches where the plaintiff does not exercise due diligence in filing suit and the defendant is thereby prejudiced.

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

Rule 28.1: Statement

General Motors is not a subsidiary of a publicly owned corporation. All subsidiaries and affiliates of General Motors Corporation are wholly-owned except:

AeroVironment Inc. (USA)
Alambrados Automatrices, S.A. de C.V. (Mexico)
Alambrados y Circuitos Electricos, S.A. de C.V. (Mexico)
AMBRAKE Corporation (USA)
Applied Intelligence Systems, Inc. (USA)
Aralmex, S.A. de C.V. (Mexico)
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)
Cableados de Juarez, S.A. de C.V. (Mexico)
CABLESA-Industria de Componentes Electricos Limitada (Portugal)
Calsonic Harrison Co., Ltd. (Japan)
Compagnie de Faisceaux Tunisian International S.A. (Tunisia)
Compania Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)
Componentes Delfa, C.A. (Venezuela)
Componentes Mecanicos de Matamoros, S.A. de C.V. (Mexico)
Compresores Delfa, C.A. (Venezuela)
Conductores y Componentes Electricos, de Juarez, S.A. de C.V. (Mexico)
Convesco Vehicle Sales GmbH (West Germany)
Daewoo Automotive Components, Ltd. (Korea)
Daewoo Motor Co., Ltd. (Korea)
Delco Electronics Corporation (USA)
Delkor Battery Company, Ltd. (Korea)
Delmex de Juarez, S.A. de C.V. (Mexico)
Delredo, S.A. de C.V. (Mexico)
Delta Industrial, C.A. (Venezuela)
Detroit Deere Corporation (USA)
Detroit Diesel Corporation (USA)
DHB - Componentes Automotivos S.A. (Brazil)
DHMS Industries, Ltd. (Korea)

Diffracto Limited (Canada)
DR DE CHIHUAHUA, S.A. de C.V. (Mexico)
Ensemble de Cables Y Componentes, S.A. de C.V. (Mexico)
Fabrica Columbiana de Automotores S.A. ("Colomotores") (Columbia)
General Motors de Brasil, Ltda. (Brasil)
General Motors de Colombia S.A. (Colombia)
General Motors del Ecuador S.A. (Ecuador)
General Motors Egypt, S.A.E. (Egypt)
General Motors Espana, S.A. (Spain)
General Motors (Europe) AG (Switzerland)
General Motors France (France)
General Motors Hellas, A.B.E.E. (Greece)
General Motors Iran Limited (Iran)
General Motors Kenya Limited (Kenya)
General Motors Korea Co., Ltd. (Korea)
General Motors del Peru S.A. (Peru)
General Motors de Portugal, Limitada (Portugal)
General Motors Terex do Brasil Ltda. (Brasil)
Genie Mecanique Zairose, S.A.R.L. (Zaire)
GM Allison Japan Limited (Japan)
GM Locomotivas Ltda. (Brazil)
GMFanuc Robotics Corporation (USA)
Hua Tung Automotive Corporation (Rep. of China)
IBC Vehicles Limited (England)
Ilmor Engineering, Ltd. (England)
Industries Mecaniques Maghrebines, S.A. (Tunisia)
Industrija Delova Automobila, Kikinda (Yugoslavia)
INLAN-Industria de Componentes Mecanicos, Lda. (Portugal)
Isuzu Motors Limited (Japan)
Isuzu Motors Overseas Distribution Corp. (Japan)
Kabelwerke Reinshagen GmbH (West Germany)
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)
Kablewerke reinshagen Werk Neumarkt GmbH (West Germany)
Koram Plastics Company, Ltd. (Korea)

Metal Casting Technology, Inc. (USA)
Motor Enterprises, Inc. (USA)
New United Motor Manufacturing, Inc. (USA)
NHK Inland Corporation (Japan)
Omnibus BB Transportes, S.A. (Ecuador)
Packard Electric Ireland Limited (Ireland)
Philip Crosby Associates, Inc. (USA)
Promotora de Partes Electronicos Automotrices (Mexico)
P.T. Mesin Isuzu Indonesia (Indonesia)
Rimir, S.A. de C.V. (Mexico)
Rio Bravo Electricos, S.A. de C.V. Mexico)
Robotic Vision Systems, Inc. (USA)
Senalizacion y Accesorios del Automovil Yorka, S.A. (Spain)
Shinsung Packard Company, Ltd. (S. Korea)
Suzuki Motor Co., Ltd. (Japan)
Tactical Truck Corporation (USA)
Teknowledge, Inc. (USA)
TEREX Equipment Limited (Scotland)
Vauxhall Motors Limited (England)
Vestiduras Fronterizas, S.A. de C.V. (Mexico)
View Engineering (USA)
Volvo GM Heavy Truck Corporation (USA)

As of September 1, 1988

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Citations to Opinions Below

Respondent adopts the Petitioner's recitation of opinions below.

No. 88-255

IN THE

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OCTOBER TERM, 1988

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vs.

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On Petition for Writ of Certiorari to the
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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTIONAL STATEMENT

The judgment of the District Court of the Eastern District of Missouri, Eastern Division was filed on April 24, 1987. The judgment of the Eighth Circuit Court of Appeals was filed on April 14, 1988. A petition for rehearing was filed and subsequently denied on May 20, 1988. The Petition for a Writ of Certiorari was filed on August 8, 1988. Jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari is conferred upon this Court by 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This Title VII case is based on a race discrimination charge which Petitioner Warren Garrett filed with the EEOC in October 1970, almost eighteen years ago.[1] That charge alleged that certain terms and conditions of Garrett's employment with Respondent General Motors Corporation, (hereinafter sometimes referred to as "G.M.") were discriminatory. In 1971, the year after the charge was filed, Garrett was discharged from his employment with G.M. for participation in a wildcat strike in contravention of the contract between G.M. and Garrett's Union, the United Auto Workers. Garrett never amended his EEOC charge to allege that his discharge was racially motivated.

Garrett alleged his discharge on March 29, 1971 was in violation of Title VII. G.M. has a progressive discipline policy, and because Garrett was already at the final step of that policy, he would have been discharged for any disciplinary violation. (T.276, 286). As was specifically found in *Mosley v. General Motors Corporation,* 497 F.Supp. 583, 589 (E.D. Mo. 1980),

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[1] The only record of the charge is the charge control ledger produced by the EEOC. The actual EEOC records were destroyed between March 1976 and March 1979, and G.M. did not retain its complete EEOC file regarding Garrett after being notified by the EEOC that Garrett's file was closed. EEOC records do not indicate the filing of a second charge in March 1971, even though the purported charge was produced at trial. Garrett also filed a complaint of discrimination with the St. Louis Council on Human Relations on March 18, 1971. (T.63-65; and G.M. Exhibit Q). Garrett admitted receiving a letter from the St. Louis Council on Human Relations sometime in 1974 stating that their investigation revealed no discrimination. (T.64-65; G.M. Exhibit R).

G.M. was free to discipline the employees who engaged in the wildcat strike.[2]

From June of 1970 through March of 1971, Garrett was tardy eleven times. (G.M. Exhibit N). Garrett was disciplined for being tardy the ninth time, on January 28, 1971. (G.M. Exhibit C; T.88). Garrett was unable to recall, because of the sixteen years that had elapsed from the date of these events and the date of trial the circumstances surrounding his tardiness or discipline imposed. (T.88-89).

Garrett also had a horrendous absentee record. According to Garrett's absence record, he was absent ten times between June of 1970 and February of 1971. (G.M. Exhibit M). On March 11, 1970, the eleventh (11th) time he was absent, Garrett was given a written reprimand for being absent from work without reasonable cause. (G.M. Exhibit C; T.92-95). On the following day, March 12, 1970, Garrett received a suspension for the balance of the shift plus one day for being late to work. (G.M. Exhibit C; T.93-94).

In June of 1970, Garrett was suspended for the balance of the shift plus three days for using abusive language to a supervisor. (G.M. Exhibt C). Garrett admitted that in this incident had had a knife in his hand and that he got upset with his foreman. (T.96-97). On December 22, 1970, Garrett was suspended for the balance of the shift plus one week for being under the influence of alcohol and for using vulgar language. (G.M. Exhibit C; T.98-99). Garrett admitted that he drank alcohol during his lunch period, and that he yelled at his foreman. (T.99-100).

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[2] The plaintiffs in *Mosley* had not similarly reached the last level in the disciplinary process. While the District Court did indicate that G.M. was collaterally estopped by *Mosley*, it is clear from the decision that the statement was used only in the context of discussing the second element of laches, prejudice to the defendant. (App. p. 32a) (T.291-293; G.M. Exhibits HH-1 - HH-126).

On January 28, 1971, Garrett was suspended for the balance of the shift plus two weeks for being late to work. (G.M. Exhibit C; T.101-102). On March 17, 1971, Garrett was suspended for the balance of the shift plus thirty days for leaving the plant without permission. (G.M. Exhibit C; T.103). Garrett admitted that he left the plant without permission and was disciplined. (T.103-104). Prior to leaving the plant, Garrett was stopped by a security guard and instructed to return to his job. (G.M. Exhibit C; T.105).

On March 29, 1971, Garrett was discharged for participating in an unauthorized work stoppage. (G.M. Exhibit C; T.107). Garrett admitted that he participated in the unauthorized work stoppage. (T.107-108).

Garrett's discipline record indicate that from June of 1970 through March of 1971, he was disciplined six times in a progressive manner. (G.M. Exhibit C; T.284-285). Garrett's discharge on March 29, 1971 was the seventh disciplinary action taken against him in a nine month period. (T.284-85). Furthermore, according to the progressive discipline policy, when an employee is at the sixth and final step of discipline, any rule violation can be the basis for the employee's discharge. (T.286).

The District Court found that from the time of his discharge in 1971 until 1980, Garrett made no active inquiry into the status of his charge, though during most of this period he could have requested a right-to-sue letter from the EEOC and filed suit against G.M. He had even contacted several private attorneys about his case, and each instructed him to request a right-to-sue letter. (T.82-83). By 1979 at the latest, eight years after the charge had been filed, the EEOC destroyed Garrett's charge file in accordance with its internal procedures. Garrett inquired about his charge in 1980 in response to a newspaper article; the EEOC told him that his file had been destroyed and there was nothing further the EEOC could do. (T.75). Sometime between September and October of 1982, after G.M. had been in-

formed by the EEOC that the case was closed and the file destroyed, G.M. decided not to retain closed records over ten years old. (T.346). Those files were purged to conserve space. (T.348). Included were records pertaining to Mr. Garrett, including information in connection with each particular disciplinary matter. (T.346-47). The records would also have included interviews with supervisors and anyone that might have had direct contact with the particular disciplinary matter, the notice of discipline, a fact sheet completed by the foreman, and notes from the disciplinary interview conducted by the labor relations representative with all the information he was able to obtain in the interview. (T.347).

Garrett did not contact the EEOC between 1980 and 1983. In late 1983, Garrett again contacted the EEOC, this time to determine whether he was covered by a national settlement agreement negotiated by G.M. and the EEOC. After several years during which the EEOC attempted to determine whether Garrett was covered by the settlement agreement and whether it had ever sent a right-to-sue letter to Garrett, a new right-to-sue letter was issued in July 1985. An earlier right-to-sue letter, however, may very well have been sent as early as 1972.

Two representative from the EEOC attempted to reconstruct at trial the EEOC handling of Garrett's charge. The charge control ledger and the case control ledger were the only documents which the EEOC retained concerning Garrett's charge. (*See* G.M. Exhibit T and U). The EEOC admitted that from 1976 through 1983, both the case control ledger and the charge control ledger indicated that there was absolutely no activity on Garrett's charge. (T.205). Furthermore, if Garrett had called the EEOC to find out the status of his charge from 1976 through 1983 and the EEOC personnel checked the charge control ledger, they would know that the file was closed. (T.205-07). When G.M. inquired concerning the status of Garrett's charge on January 20, 1980, it was informed that the file was closed and destroyed. (T.209-11, 242-3; G.M. Exhibit W).

Once G.M. was notified of the closure of the file, it was no longer obligated to keep the documents relevant to Garrett's charge. (T.242-43).

An EEOC representative from the Office of Congressional Affairs wrote a letter dated March 20, 1984, to Congressman William Clay informing him that there was an unsuccessful conciliation of Garrett's charge, and that Garrett had, in fact, been issued an earlier right-to-sue letter. (T.200; G.M. Exhibit Y).

The EEOC, in a letter addressed to Garrett dated June 21, 1984, stated that due to the time elapsed, their research on whether he was issued a right-to-sue letter was inconclusive. (T.213-14; G.M. Exhibit Z). Because Garrett's EEOC file was destroyed, the information concerning Garrett's charge was based upon supposition. (T.218). The EEOC could not determine whether or not Garrett had been issued a right-to-sue letter. (T.218).

Garrett's file was sent to the EEOC records center in March of 1976. (T.204-04). According to the EEOC representative testifying before the District Court, it was the standard procedure of the EEOC to send a file to the records center only after the final EEOC actions have been taken. (T.204). Moreover, it was the general practice of the EEOC to notify the charging party that the final actions have been taken regarding the charge. (T.205).

Making matter more complex, another representative of the EEOC testified that the EEOC has used a two and three letter system for notifying charging parties concerning the status of their charges. (T.146-57). The first letter is identical under both of these systems. (T.147). It informs the charging party that conciliation efforts by the commission have failed and that if 180 days have expired, the charging party may request a right-to-sue letter. (T.147). It was the standard practice of the EEOC to issue the first letter after conciliation efforts had failed. (T.148).

Under the procedure utilized in 1972 and 1973, Garrett should have been issued the first letter notifying him that conciliation efforts had failed and that he could request a right-to-sue letter with 180 days of filing his charge. (T.149), 151). Garrett acknowledged that he received this letter. (T.73). Garrett also admitted that he received "quite a few letters from the EEOC," but could not specifically say what they were. (T.73).

Prior to the 1972 amendment to Title VII, the EEOC did not have the power to file suit on behalf of a charging party. Consequently, a notification by the commission that conciliation efforts had failed constituted a right-to-sue letter.[3] Neither representative from the EEOC knew under which procedure Garrett received his notice that conciliation efforts had failed. (T.202, 245-47). If Garrett had been issued that type of letter from the EEOC stating that conciliation efforts had failed, that letter would have been destroyed by the EEOC in 1979 when Garrett's file was destroyed. (T.202-03).

It was also the normal practice for the EEOC, under the three letter system used after 1973 to issue a right-to-sue letter after a file had been rejected for litigation by the EEOC. (T.151-52). It is undisputed, however, that the EEOC did not ultimately take Garrett's case to litigation. If Garrett had been sent a letter rejecting his case for litigation and a right-to-sue letter, a copy of each letter would have been kept in the EEOC file until it was destroyed. (T.158). The receipt of the letter rejecting his case for litigation would begin the ninety day period for filing suit under Title VII. *Lacy v. Chrysler Corporation,* 533 F.2d 353, 360-1 (8th Cir.), *cert. denied,* 429 U.S. 959 (1976). Thus, regardless of the system used, it was probable that an earlier right-to-sue letter had been sent. (App. at 25a).

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[3] *Tuft v. McDonnell Douglas Corporation,* 517 F.2d 1301, 1305 (8th Cir. 1975).

Garrett filed this suit on September 11, 1985, approximately fourteen years after his discharge and fifteen years after his charge had been filed with the EEOC. The complaint alleged, among other things, that Garrett had been discriminatorily discharged from G.M.'s employ; the District Court held that the unamended EEOC charge was broadly enough worded to support the discharge claim.

However, the District Court dismissed the action on the grounds of laches, holding that Garrett had unreasonably delayed filing suit, to the detriment of G.M. In particular, the court noted that Garrett might have been sent a right-to-sue letter sometime in the 1970's, that it was impossible to resolve this issue because of the passage of time, and that Garrett's delay therefore prejudiced a probable statute of limitations defense. (App. at 25a-33a).

On appeal, the Eighth Circuit Court of Appeals unanimously affirmed the District Court's decision. The panel considered and rejected Garrett's argument that a Title VII plaintiff has the absolute right to await the administrative processing of this EEOC charge before filing suit, no matter how long that processing takes and regardless of whether the plaintiff ever investigated the status of his charge. The panel also upheld the District Court's finding that laches applied to the circumstances of Garrett's case. Contrary to Petitioner's suggestion, the Court of Appeals "declined to reach" the question concerning collateral estoppel and the *Mosley* case. (App. at 14a)

SUMMARY OF ARGUMENT

It is well established that laches may be utilized as a defense in a Title VII suit brought by a private plaintiff. Petitioner's suggestions that laches never be applied when the delay is caused by the EEOC would, as a practical matter, destroy the use of laches. The only unregulated time period, and therefore the only time period amenable to laches analysis, is the time frame occasioned by EEOC processes. Moreover, application of laches to private individuals would not, contrary to Petitioner's claims, interfere with the legitimate investigative functioning of the EEOC, as the doctrine is applied only in cases of "unreasonable" delay.

The application of laches is decidedly fact-based. It is the fact based nature of laches that is reflected in the divergent results reached by the various circuits. No circuit has adopted the absolute rule suggested by Petitioner, and no true conflict among the circuits exist.

This question arises too infrequently for consideration by this court. Moreover, if delays caused by the EEOC causes a substantial burden and is truly considered a widespread concern, it is more appropriately dealt with by congressional, not judicial, action.

ARGUMENT

I. The Decision Below Applies Established Precedent to the Specific Facts of this Case.

Petitioner suggests that review by this Court is required because certain Supreme Court cases are "implicated." While it is true that the goals of these cases are implicated, the decision of the Eighth Circuit is entirely consistent with those goals, while the result sought by Petitioner is inconsistent.

It is well settled that the doctrine of laches may be invoked as a defense in a Title VII action. *See, Albemarle Paper Company v. Moody,* 422 U.S. 405, 424-5 (1975); *Occidental Life Insurance Company of California v. EEOC,* 432 U.S. 355, 373 (1977). This is true even when the plaintiff is a private party. *Id.*

Adoption of Petitioner's position would, as a practical matter, completely remove laches as a defense against private plaintiffs. Under Title VII, the time period during which the EEOC investigates and reviews a charge is not limited by the Act. *Id.* The three hundred day period in which a charge must be filed and the 90 day period following receipt of the right-to-sue letter during which suit must be brought are reviewed under tolling analysis. In addition, application of laches is not feasible when dealing with such short periods of time. As noted in *EEOC v. Mistletoe Express Service,* ____ F.Supp. ____, 45 FEP 777, n. 1 (S.D. Tex. 1987), there have been no reported cases in which laches was applied where the suit was commenced less than two years after filing of the charge. Thus, as a practical matter, adoption of Petitioner's position is the functional equivalent of overruling this Court acceptance of laches in *Albemarle* and *Occidental.*

Petitioner argues that the goals of Title VII are thwarted by the application of laches to a private plaintiff who has waited 15 years for the EEOC to complete processing his charge before bringing suit. These generalized goals, however, do not compel

review by this court. In *Albemarle,* this court recognized that, "on these issues of procedural regularity and prejudice, the 'broad aims of Title VII' provide no ready solution." *Id.* at 425.

The particularized goal of protecting the EEOC as primary enforcer of Title VII does not warrant the establishment of an absolute right of a private plaintiff to await completion of EEOC processes before requesting a right-to-sue letter. In fact, that goal would seem to suggest the opposite. If the EEOC is the primary enforcer of Title VII and it is permissible to apply laches to it, it is equally permissible to apply laches to a private plaintiff, as a secondary enforcer, for the very same delay. The EEOC's right to proceed, in any given matter, is certainly not less than private individuals. *See, Occidental Life Insurance Co. of California v. EEOC,* 432 U.S. 355, 373 (1977).

Moreover, this case does not factually present a situation in which the processes were continuing and any delay was attributable to the EEOC's workload. On the contrary, the EEOC had long since ceased investigating the claim, closed the matter, and destroyed the file. From the EEOC's perspective, its role had been complete for almost ten years prior to suit being brought.

One recurrent principle found in this court's pronouncements is the need to allow lower courts "discretionary power 'to locate a "just result" in light of the circumstances peculiar to case'." *Occidental Life Insurance Co. of California v. EEOC,* 432 U.S. 355, 373 (1977), citing *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 424-425 (1975). The trial court in this case did just that. After a full trial, the judge concluded that the plaintiff had not exercised due diligence in following the status of his EEOC charge. Under normal circumstances he would already had been issued a right-to-sue letter as many as ten years before he brought suit, and the files were destroyed by the EEOC over six years before he brought suit. Thus, the existence of an earlier

right-to-sue letter could not be proven. Therefore, the decision in this case is quite unique. The question presented was not merely if plaintiff had the absolute right to not request a right-to-sue letter during the pendency of the EEOC process, but if this plaintiff had ever in fact received an earlier right-to-sue letter.

Unlike the majority of cases cited by Petitioner, this case does not involve good faith reliance on continued assurances by the EEOC of an ongoing and active investigation[4] or destruction of documents attributable to defendant.[5] In fact, the District Court found that Petitioner's contact with the EEOC during his 15 year wait was minimal, and that it was the EEOC that destroyed the file. Respondent was told by the EEOC three (3) years prior to the suit that the matter had been closed, a right-to-sue letter issued, and that the file had been destroyed. This same information was also given by the EEOC to the Petitioner's United States Congressman. This unique factual scenario was properly analyzed "in light of the circumstances peculiar to the case" as suggested in *Occidental* and *Albemarle*. The writ should not be granted merely to review the District Court's application of the mandate of *Occidental* and *Albemarle* to the specific and unique facts of this case.

II. There is no Genuine Conflict Among the Circuits.

Every Circuit reaching the question has held that the defense of laches is available in Title VII suits brought by private plain-

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[4] *See, Rozen v. District of Columbia*, 702 F.2d 1202 (D.C. Cir. 1983); *Gifford v. Atchison, Topeka and Santa Fe Railroad Co.*, 685 F.2d 1149 (9th Cir. 1982).

[5] *See, Bernard v. Gulf Oil Co.*, 596 F.2d 1249 (5th Cir. 1979); *Howard v. Roadway Express, Inc.*, 726 F.2d 1529 (11th Cir. 1984); *Rozen v. District of Columbia*, 702 F.2d 1202 (D.C. Cir. 1983).

tiffs.[6] Also universally accepted is the notion that the determination of laches is heavily fact based, reviewed according to the specific facts of each case. *Gifford v. Atchison Topeka & Santa Fe Railroad Co.*, 685 F.2d 1149, 1152 (9th Cir. 1982).

Petitioner's characterization of the holdings of the Fourth, Fifth, Ninth, Eleventh and District of Columbia Circuits as necessarily in conflict with those of the Sixth, Seventh and Eighth[7] Circuits is incorrect. Petitioner has taken phrases used to characterize behavior in a given case and imbued them with universal applicability. In fact, the different results reached in these circuits are a reflection of specific facts and not the application of different law.

The Fourth Circuit, in *Holsey v. Armour & Co.*, 743 F.2d 199, 211 (4th Cir. 1984) merely noted that the "[The plaintiff's] decision to rely on the Commission's administrative process before initiating a private suit is not inexcusable delay." The terse holding was limited by its very terms to the decision of that plaintiff.

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[6] *See, Waddell v. Small Tube Products, Inc.*, 799 F.2d 69 (3rd Cir. 1986); *Holsey v. Armour & Co.*, 743 F.2d 199, 211 (4th Cir. 1984); *Bernard v. Gulf Oil Co.*, 596 F.2d 1249, 1256 (5th Cir. 1979), aff'd on other grounds, 452 U.S. 89 (1981); *Cleveland Newspaper Guild v. Plain Dealer Publishing Co.*, 839 F.2d 1147 (6th Cir. 1988) (en banc), pet. for cert. filed 56 U.S.L.W. 3806 (No. 87-1864); *Jeffries v. Chicago Transit Authority*, 770 F.2d 676 (7th Cir. 1985) cert. den. 475 U.S. 1050 (1986); *Whitfield v. Anheuser-Busch, Inc.*, 820 F.2d 243, 244-5 (8th Cir. 1987); *Boone v. Mechanical Specialties Co.*, 609 F.2d 956 (9th Cir. 1979); *Howard v. Roadway Express, Inc.*, 726 F.2d 1529, 1532 (11th Cir. 1984); *Rozen v. District of Columbia*, 702 F.2d 1201, 1203 (D.C. Cir. 1983).

[7] Petitioner failed to note the holding of the Third Circuit as consistent with the Sixth, Seventh and Eighth Circuits. *Waddell v. Small Tube Products*, 799 F.2d 69 (3rd Cir. 1986).

The Fifth Circuit, in *Bernard v. Gulf Oil Co.*, 596 F.2d 1249 (5th Cir. 1979), faced the issue in the context of ruling on a motion for summary judgment. The court refused to apply the doctrine of laches, "because the facts as presented on this summary judgment motion, without more, do not allow a finding of laches." The court nonetheless continued to discuss the second element of laches, prejudice to defendants, and reasoned that any prejudice to defendants was in fact, attributable to the defendants, not the plaintiff. The court closed discussion of the issue by stating:

> "We conclude that the present facts do not allow findings of either unreasonable delay or prejudice." *Id.*

The Ninth Circuit serves as an excellent example of the fact based nature of laches. In *Boone v. Mechanical Specialties Co.*, 609 F.2d 956 (9th Cir. 1979), the court held that a plaintiff does not have an absolute right to await completion of EEOC processes before seeking a right-to-sue letter, and applied laches to a private plaintiff's Title VII suit. In *Gifford v. Atchison, Topeka and Santa Fe Railroad Co.*, 685 F.2d 1149 (9th Cir. 1982), the court was faced with the denial of a summary judgment motion. In sharp contrast to the facts of the instant case, the court noted that in opposing the motion for summary judgment "plaintiff's attorney submitted an extensive affidavit . . . detailing repeated and continuous efforts of plaintiff and her attorneys to monitor the progress of her charge through the EEOC." (*Id.* at 1152). The court concluded that "there are material factual issues to be resolved." (*Id.*). It can hardly be said that the Ninth Circuit recognizes, as Petitioners suggest, an absolute right to await completion of administrative processes.

The Eleventh Circuit, in *Howard v. Roadway Express, Inc.*, 726 F.2d 1529 (11th Cir. 1984), similarly refused to establish any such absolute right. The court noted that there were "exceptions" to the rule that plaintiffs should normally be allowed to wait for termination of the EEOC's process before filing suit,

but declined "to make an exception in this case." *Id.* Interestingly, just as in *Bernard,* the court proceeded to review the element of prejudice to the defendant, and concluded that any prejudice was attributable solely to defendant.

The last case Petitioner relies on is *Rozen v. District of Columbia,* 701 F.2d 1202 (D.C. Cir. 1983). In *Rozen,* the D.C. Circuit considered in detail the record of the plaintiff's dealing with the EEOC, and held only that under the circumstances, the plaintiff was not unreasonable in waiting. The court concluded that the steps taken by the plaintiff to pursue his claim "sufficiently rebuts any inference that Rozen was content to 'sleep on his rights'." *Id* at 1204. In addition, the court noted defendant's failure to prove any prejudice. Such a detailed factual analysis does not indicate a view of the law different from that of the Eighth Circuit in the instant case.

Rather than an actual difference of opinion of the law of laches amongst the circuits, the different results appear to arise solely because of the facts of each case and the manner in which the case is presented. No true conflict exists.

III. Review by this Court is Neither Appropriate nor Necessary.

Petitioners seek to establish an absolute rule that a plaintiff may wait forever for the EEOC to complete its investigative processes prior to bringing suit. This position has not been adopted by any circuits. Respondent merely suggests that a plaintiff may not wait an unreasonable period of time and thereby fail to fulfill the duty to exercise due diligence. As the cases indicate, there are times when reliance on the EEOC is reasonable, and there are other times, admittedly more rare, when the wait is not reasonable. As the Third Circuit noted in reviewing all of the cases:

> "In sum, although plaintiffs have some obligation to monitor the progress of their charge and do not have the absolute right to await termination of EEOC proceedings

where it would appear to a reasonable person that no administrative resolution will be forthcoming, whether the circumstances warranted the delay in a particular case requires an ad hoc determination." *Waddell* at p. 77

The attempt by Petitioners to remove the trier of fact's discretionary power to "locate a just result" should be avoided. At the very least, the infrequency with which this question arises should indicate that review by this court is unnecessary.

Additionally, resolution of this matter should more appropriately be made by Congress. Petitioner notes recent passage of an analogous law, the Age Discrimination Claims Assistance Act of 1988, P.L. 100-283, specifically aimed at relieving individuals of the burdens caused by delays in EEOC processing. Any similar burden imposed on Title VII plaintiffs because of EEOC delays could be similarly, and more appropriately, addressed by Congress.

CONCLUSION

The Petition for A Writ of Certiorari should be denied.

LASHLY, BAER & HAMEL
A Professional Corporation
JAMES E. McDANIEL*
ROBERT A. KAISER
714 Locust Street
St. Louis, Missouri 63101
(314) 621-2939

DAVID M. DAVID,
LEGAL STAFF
GENERAL MOTORS
CORPORATION
3031 West Grand Boulevard
Detroit, Michigan 48232

ATTORNEYS FOR RESPONDENT

*Counsel of Record